In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 750

SALVATORE BONANNO AND PETER NOTARO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is not yet reported. The opinion of the district court (Pet. App. 11a–22a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1970. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to September 26, 1970. The petition was filed on September 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

410-017—70

QUESTIONS PRESENTED

1. Whether the trial judge properly denied petitioners' motion for a new trial based upon discovery of an indictment pending against one of the government's witnesses which the prosecutor had failed to disclose.

2. Whether the trial judge erred in his instruction concerning fraudulent intent.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on one count of conspiracy and fifty-two counts of mail fraud, in violation of 18 U.S.C. 371, 1341 and 1342. In addition, petitioner Bonanno was convicted on two counts of perjury in violation of 18 U.S.C. 1621. On March 9, 1970, Bonanno was sentenced to concurrent terms of four years' imprisonment on each count and fined $10,000; Notaro was sentenced to concurrent terms of one year and fined $1,000. The court of appeals affirmed (Pet. App. 1a–9a).

Evidence adduced at trial showed that Samuel Perrone, a co-conspirator since deceased, demanded that one Torrillo give him his Diner's Club credit card in order to buy airline tickets. Out of fear of Perrone's reputed violent nature, Torrillo surrendered the card; Perrone then left with petitioner Notaro, who was waiting in a car outside (Tr. 117–118, 143, 220). Torrillo testified that he did not authorize Perrone or either petitioner to use the card (Tr. 119–120).

Shortly thereafter, petitioners Bonnano and Notaro drove from New York City to Tucson, Arizona. They used the card to make purchases en route and in Tucson. In charging items, either Bonanno or Notaro would represent himself as Torrillo. Altogether, petitioners charged fifty-eight bills totalling $2,469 (Tr. 2–6, 9–10, 49–67, 253–255, 271–272, 281–282, 579, 581, 602, 606–623).

At the conclusion of the trial, the judge instructed the jury that intent to defraud was an essential element of the crime of mail fraud. After defining the term "intent to defraud," the court explained (Tr. 764):

> An issue has been raised, however, as to whether the defendants intended to defraud anybody, or whether they devised a scheme to defraud substantially as alleged. Did they, in using Torrillo's card, and falsely representing themselves to be Torrillo, intend to deceive the establishments and Diners' Club into furnishing merchandise and services that would not have been furnished if their true identities were disclosed? Or did they believe that misrepresenting themselves to be Torrillo was immaterial, and that it was perfectly lawful and all right to use the card?

The court properly instructed that it was not essential to prove that the card had been extorted if it were shown that petitioners intended to deceive the various establishments. It then stated (Tr. 766):

> If, on the other hand, you find that the defendants believed that their misrepresentations of their identity was immaterial, or that they

had the right to use the card, you would find that there was no scheme to defraud.

Five days after the guilty verdict was returned, petitioners' counsel moved for a new trial on the ground that the government had failed to reveal that Torrillo was under indictment for federal securities fraud at the time of petitioner's trial. The trial judge denied the motion, finding that the trial record showed no "significant possibility that the pendency of the indictment against Torrillo, had it been known to the jury, might have raised a reasonable doubt as to the defendants' guilt" (Pet. App. 19a). The court of appeals affirmed; it found that the prosecuting attorney had not acted in bad faith, but should not have assumed that defense counsel knew of the indictment.[1] Even so, the court below concluded that the nondisclosure was not so significant as to require a new trial, since, regardless of how petitioners obtained the card, the evidence overwhelmingly established their fraudulent use of it (Pet. App. 7a–8a).

ARGUMENT

1. As pointed out by the court below (Pet. App. 7a), "[s]ince the nondisclosure here was negligent, [petitioners] must show that the indictment against Torrillo was material to the verdicts against them."

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[1] The basis for this assumption appears from the affidavits of Torrillo and the four United States Attorneys connected with either this case or Torrillo's, which were submitted to the district court on February 19, 1970. A copy of each affidavit has been filed with the Clerk of this Court.

See *United States* v. *Miller*, 411 F 2d 825, 832 (C.A. 2). No such showing has been made.

Petitioners contend that disclosure of the indictment might have led the jury to infer that Torrillo's cooperation was given to gain some benefit in the pending federal prosecution against him. However, as noted by the trial court (Pet. App. 15a, 19a–20a), Torrillo first communicated with the New York City police who then had no knowledge of the federal indictment; "there was never any suggestion that Torrillo might receive consideration from federal authorities if he cooperated" (Pet. App. 20a) with the local officers.

The cross-examination of Torrillo as to his motive for testifying was extensive. Torrillo revealed that he had lied to the Diner's Club when first applying for the card and, later, when reporting its loss (Tr. 120–121, 144–145, 154–156); that he had lied before the grand jury (Tr. 147–148, 203–207) and an Assistant United States Attorney (Tr. 203–206); and that he had lied to New York City Police Department detectives during an interview, recordings of which were later admitted at trial (Tr. 450, 467, 503). Moreover, Torrillo was questioned on his fear of prosecution for perjury before the grand jury if he did not testify for the government. The point was made to the jury that Torrillo was never indicted on this charge despite his admitted perjury (Tr. 207–209). Thus, petitioners had ample opportunity to discredit the government's witness. In these circumstances, non-

disclosure of the pending indictment against Torrillo was not so material as to require a new trial.

In any event, it was basically immaterial how petitioners obtained the card. The gist of the fraud charged was that petitioners misrepresented themselves as "Don A. Torrillo" or "Dominick Torrillo" when using the card for various purchases at establishments which would not have honored the card without their misrepresentation. Their acts constituted a fraud against these establishments and against the Diner's Club, but not against Torrillo. Whether or not Torrillo authorized the use of the card was of only limited relevance to the central issue of whether petitioners intended to mislead merchants with whom they were dealing by impersonating Torrillo. As the court below noted, evidence of this intent was overwhelming (Pet. App. 8a).

2. Petitioners also contend that the trial judge's instructions concerning fraudulent intent were self-contradictory and removed from the jury consideration of petitioners' good-faith belief that they had been authorized to use the credit card and intended to repay charges made with the card. This is not so. The portion of the instruction being challenged by petitioners (see italics at Pet. 11), when read in context, properly informed the jury that a scheme to defraud could be found if the evidence showed only that the defendants intended to deceive the Diner's Club and others "into furnishing goods and services that would not have been furnished if they had dis-

closed their true identities." The court was careful to add, however, that if the defendants believed their representations were immaterial or that they had the right to use the card, they should not be convicted. The charge thus properly placed the issues before the jury.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
RONALD G. SCHEERAGA,
Attorneys.

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